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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-789

DANIEL FATICO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of Facts	3
Reasons for Granting the Writ	7
Argument:	
POINT I—Applicable Decisions of This Court Recognize That a Criminal Defendant Is Entitled to Confront and Cross-Examine His Accusers in a Sentencing Hearing in Which a Substantial Liberty Interest Is at Stake	11
POINT II—The Ninth Circuit Has Specifically Held That a Criminal Defendant Is Entitled to Confront and Cross-Examine His Accusers in a Sentencing Hearing in Which a Substantial Liberty Interest Is at Stake	15
POINT III—Similar Hearsay Assertions Made by Anonymous Informants Who Were Not Subject to Cross-Examination Are Not Sufficient to Corroborate One Another	16
POINT IV—The Second Circuit Has Rendered a Decision on the "Jencks" Issue in Conflict With Decisions of Other Courts of Appeal	18
Conclusion	21

TABLE OF CITATIONS

	PAGE
Gardner v. *Florida*, 430 U.S. 349 (1977)	13
Jencks v. *United States*, 353 U.S. 657 (1957)	20
Rovario v. *United States*, 353 U.S. 53 (1957)	11, 12
Specht v. *Patterson*, 386 U.S. 605 (1967)	13, 14
Townsend v. *Burke*, 334 U.S. 763 (1948)	13
United States v. *Covello*, 410 F.2d 536 (2d Cir. 1969)	20
United States v. *Duardi*, 384 F.Supp. 874 (W.D. Miss. 1974)	8, 16
United States v. *Fatico*, 441 F.Supp. 1285 (E.D.N.Y. 1977)	4
United States v. *Fatico*, 579 F.2d 709 (2d Cir. 1978)	5
United States v. *Fatico*, 458 F.Supp. 388 (E.D.N.Y. 1978)	5, 6, 7, 19
United States v. *Kelly*, 269 F.2d 448 (10th Cir. 1955)	21
United States v. *Murphy*, 569 F.2d 771 (3rd Cir. 1978)	21
United States v. *Tucker*, 404 U.S. 443 (1972)	13
United States v. *Weston*, 448 F.2d 626 (9th Cir. 1971)	15
United States v. *White*, 342 F.2d 379 (4th Cir. 1965)	20
Williams v. *New York*, 337 N.Y. 241 (1949)	12

Statutes Cited

18 U.S.C. 3577	2, 8, 9, 14
18 U.S.C. 3500	10, 18

Appendix

Appendix "A"—Decision	1a
Appendix "B"—Order	12a
Appendix "C"—Sentencing Hearing Evidence	13a
Appendix "D"—18 U.S.C. 3500	21a

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Petitioner, Daniel Fatico, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 13, 1979.

Opinion Below

The opinion of the Court of Appeals has not yet been reported. The opinion appears in Appendix "A", *infra*, p. 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 13, 1979. A petition for rehearing was denied by order dated October 5, 1979 (Appendix "B", *infra*, p. 12a).

This petition was timely filed on or before November 20, 1979, pursuant to an extension of time granted by this Court. The jurisdiction of this Court is invoked under 28 United States Code § 1254(1).

Questions Presented

1. Has petitioner been deprived of a substantial liberty interest without due process of law by reason of the admission into evidence, at his sentencing hearing, of hearsay assertions made by anonymous informants charging that he was a member of an organized crime syndicate—in circumstances where he was neither allowed to confront nor cross-examine his accusers;

2. Under the facts set forth in Question 1, *supra,* may the hearsay assertions of one or more anonymous informants sufficiently corroborate the hearsay assertions of one or more other anonymous informants so as to cure constitutional and due process objections to the admission of such evidence at petitioner's sentencing hearing; and

3. Under the facts set forth in Question 1, *supra,* was petitioner entitled, at minimum, to the production of "Jencks" material for cross-examination purposes at his sentencing hearing.

Statutes Involved

Title 18, United States Code, Section 3577 provides:

> No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Title 18, United States Code, Section 3500 is reproduced in Appendix "D", *infra,* p. 21a.

Statement of Facts

Daniel Fatico was indicted in connection with a series of truck hijackings which occurred at Kennedy Airport in 1971. After a mistrial was declared due to a jury deadlock, Fatico pleaded guilty to and was convicted of one count of conspiracy to possess a quantity of furs stolen from a foreign shipment. He faced a maximum sentence of five years imprisonment and a $10,000 fine.

Prior to sentencing, Fatico objected to and denied certain allegations in his presentence report that (1) he was a "made" member of the "Gambino Family," a reputed organized crime syndicate, and (2) he was an important figure in the upper echelons of the "Gambino Family."

This was the first time that such allegations had been asserted by the government against Fatico. Neither point had been raised at trial. These were entirely new charges, requiring proof of additional facts not established at trial.

Fatico denied these new and additional charges. In anticipation of an evidentiary hearing, the government made an "offer of proof" which included, *inter alia,* the proposed testimony of an F.B.I. agent who would testify that an anonymous informant had told him that Fatico was a member of the Gambino Family.

In addition, in a memorandum of law submitted prior to the hearing, the government indicated the additional evidence it expected to offer at the hearing:

(a) the testimony of two co-conspirators in the 1971 hijackings who testified for the government at the 1976

trial and who are under the government's witness protection program;

(b) the testimony of police officers who allegedly saw Fatico "associating" with "members" of the "Gambino Family";

(c) Fatico's prior criminal record, including burglary, bookmaking, policy, illicit manufacture of alcohol, and running a disorderly house; and

(d) Fatico's instant plea, whereby he admitted participation in the conspiracy.*

In view of the government's offer of proof, the district court (Jack B. Weinstein, J.) held that it could not, consonant with Fifth Amendment Due Process and Sixth Amendment Confrontation principles, admit into evidence at the sentencing hearing testimony of an F.B.I. agent that an undisclosed informant had told him that Fatico was a "member" of the "Gambino Family":

> "It is a violation of the Due Process and Confrontation Clauses of the Constitution to the base a critical decision affecting liberty on information from a person the government prevents the defendant from examining." (*United States* v. *Fatico,* 441 F.Supp. 1285, 1287-1288 (E.D.N.Y. 1977).)

The district court emphasized that the testimony of the undisclosed informant was "critical" and not collateral and that it could not be admitted unless "subject to meaningful cross-examination" (441 F.Supp. at 1299).

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* The additional proof actually presented by the Government at the subject sentencing hearing, which was characterized by the district court after the hearing as possessing little or no probative value, is set forth *infra,* pg. 5.

The Court of Appeals for the Second Circuit ("Second Circuit") reversed the district court, holding that admission into evidence at the sentencing hearing of information supplied by an undisclosed informant would not violate Due Process and Confrontation principles, "where there is good cause for not disclosing his identity and the information he furnishes is subject to corroboration by other means." *United States* v. *Fatico,* 579 F.2d 707, 713 (2d Cir. 1978).

Subsequently, an evidentiary hearing was held and the following categories of evidence were admitted: (1) testimony of F.B.I. agents transmitting hearsay information derived from anonymous informants; (2) accomplice/co-conspirator testimony; (3) police officer "association" testimony; and (4) Fatico's criminal record.*

Following the sentencing hearing, the district court *expressly* rejected the probative value of the second, third and fourth categories of evidence, stating that "The testimony originally proffered by the government would not have proved by a preponderance, and certainly not by 'clear, unequivocal and convincing evidence,' that defendant is a 'made' member of the Gambino Family". *United States* v. *Fatico,* 458 F.Supp. 388, 412 (E.D.N.Y. 1978).**

That is to say, the district court was of the opinion that the information supplied by *one* undisclosed informant bolstered by the remainder of the government's proof

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* The evidence adduced at the sentencing hearing is analyzed by said categories in Appendix "C", *infra,* p. 13a.

** The district court characterized the second category of evidence as "equivocal," strongly attacking the credibility of the "accomplice" witnesses (458 F.Supp. at 394, 412); characterized the third category as proving little more than the fact of innocent association (458 F.Supp. at 412); and characterized the fourth category as "the hallmark of an incompetent individual hoodlum" (458 F.Supp. at 412).

would not be sufficient to establish Fatico's membership in the Gambino Family.

The district court, however, then proceeded to conclude that a different case was presented after the hearing *simply because more* information from faceless and nameless sources was presented:

> "The fact that seven different government agents, four of them from the FBI, relying on a total of seventeen independent informants, testified that Daniel Fatico was a member of the Gambino family, is, in the court's view, highly probative." (458 F. Supp. at 412)

On this basis, the district court found that Fatico was a member of the Gambino Family and sentenced him accordingly.

The district court indicated that but for a finding that Fatico was a "made" member of the Gambino Family, Fatico would have been sentenced in the hijacking case to a term of no more than three years, to run concurrently with a previously imposed gambling sentence (458 F. Supp. at 412).

But, finding that Fatico was a member of the Gambino crime family, the district court sentenced him to a prison term of four years, to be served consecutively with his three year term for the gambling conviction (458 F. Supp. at 413):

> "In short, the result of the finding of organized crime membership will probably be five extra years of hard service in a high security prison far from his family."

Significantly, the district court expressed grave misgivings regarding the due process implications of its decision:

> "Unable to cross-examine the informants, the defendant's only hope was to attack the credibility of the Government agents by attempting to impeach them with their prior statements and reports. Without this limited weapon, the defendant remained virtually defenseless." (458 F. Supp. at 400)
>
> * * *
>
> "For the reasons stated in this opinion, the court is not satisfied that sentencing procedures in this case —denying the production of informants and prior statements of prosecution witnesses—used to make the critical finding of fact, comport with the high standards of due process expected from this country's courts. The court believes itself bound by applicable decisions and directions of the Court of Appeals of this Circuit to follow these procedures." (458 F.Supp. at 412.)

Reasons for Granting the Writ

Fatico respectfully submits that this petition should be granted for four reasons:

(a) The Second Circuit has decided a crucial federal and constitutional question regarding the due process safeguards and protections which must be accorded a criminal defendant at a sentencing hearing in a manner in conflict with applicable decisions of this Court;

(b) The Second Circuit has decided a crucial federal and constitutional question regarding the due process safeguards and protections which must be accorded a criminal defendant at a sentencing hearing in a manner in conflict with a decision of another Court of Appeals;

(c) The Second Circuit has decided a crucial federal and constitutional question regarding the due process safe-

guards and protections which must be accorded a criminal defendant at a sentencing hearing in a manner that so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and

(d) The Second Circuit has decided a crucial federal and constitutional question regarding the applicability of the due process protection of the "Jencks Act" at a sentencing hearing in a manner in conflict with decisions of other Courts of Appeal.

It has always been a fundamental tenet of American jurisprudence that adversarial confrontation and cross-examination are necessary to arrive at truth and that a criminal defendant is entitled to due process at each and every stage of the criminal prosecution upon which his liberty depends. What justification is there for abandoning these principles at a sentencing hearing where substantial liberty interests are at stake?

Although certain aspects of the sentencing process must be reserved to the subjective judgment of the court, whether Fatico is a member of the Gambino crime family is not one of them. This issue is not a subjective one. It is susceptible of proof or disproof to a state of certainty. It is a question of fact, not of judgment. It is a question which should be decided in the normal adversarial manner, with the benefit of cross-examination.*

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* 18 U.S.C. 3577 provides that a district court may consider the "background, character, and conduct" of a defendant in sentencing him, after his conviction of a crime. It does not authorize a district court, in sentencing, to entertain and decide an *additional* serious and substantive charge (which is thereafter put in dispute) in an unconstitutional manner. *See, e.g., United States* v. *Duardi,* 384 F. Supp. 874, 880 (W.D. Miss. 1974): "We have already considered and rejected the government's notion that 'information' that a defendant is connected with 'organized crime' . . . was intended to be judicially considered as a relevant sentencing factor".

Daniel Fatico has suffered an egregious deprivation of his constitutional due process rights herein. The Second Circuit has deprived him of five years of his liberty based upon nothing more substantial than rumor and street talk.

Indeed, John Capobianco, the government's key witness at the sentencing hearing:

(a) admitted that he had no personal knowledge of Fatico's mafia membership (H. 185);*

(b) admitted that his anonymous informants could not have personal knowledge whether Fatico was a member of the Gambino family because "they don't even get near the ceremony" (H. 203);

(c) admitted that the only proof besides "street talk" he had to establish that Fatico was a member of the Gambino family was "how much respect he gets" (H. 204):

> "Q. So Detective, is it your testimony that after 19 years on the Police Force, specializing in organized crime, at least to some extent, you made decisions in labeling human beings on whether the car door is opened or not opened for them?
>
> A. When it comes to organized crime, yes, sir."

(d) admitted that many of his informants were "in trouble" (H. 206) and that he would advise the D.A.'s office that they were "cooperating" (H. 211); and

(e) finally, admitted that:

> "these [informers] are guys that walked in, and they had beefs against this guy and that guy and in between and they want to settle a beef" (H. 208).

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* "H" references are to pages of the transcript of the evidentiary hearing held herein, pursuant to 18 U.S.C. 3577, on July 7, 1978. *See* p. 13a, *infra.*

Indeed, not one witness at the sentencing hearing who transmitted information from anonymous informants could affirm: (1) that he had personal knowledge that Fatico was a member of the Gambino family; (2) that any of his anonymous informants had such personal knowledge; (3) that he had any information which could independently corroborate the assertions derived from his anonymous informants; or (4) that he could vouch for the reliability of any of his anonymous informants or otherwise state the basis for their information.

Indeed, even the limited cross-examination of the five witnesses (four former or present FBI agents and one local police detective) who transmitted information from the anonymous informants further reveals the basic unreliability of said anonymous informants:

(a) four of the five witnesses either admitted that their informants were in "trouble" when they turned FBI's evidence or admitted that they did not know whether their informants were "in trouble;"* and

(b) four of the five witnesses were either unwilling to disclose, lacked knowledge, or admitted that their informants had "deals" with the government.*

In short, Fatico has been deprived of five years of his liberty on the basis of double hearsay of the rankest kind.

It is no wonder that the district court had grave misgivings about its decision herein.**

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* The one witness who did not said that his informant "believed" that Fatico was a member of the Gambino Family (H. 65), based on the opinion of others (H. 65-66). See, generally, Appendix "C", *infra*, p. 13a, which contains a thorough analysis of the evidence adduced at the sentencing hearing.

** It is *impossible* to test the truth of what government agents may testify that informants may have told them without cross-examination and "3500" disclosure.

POINT I

Applicable Decisions of This Court Recognize That a Criminal Defendant Is Entitled to Confront and Cross-Examine His Accusers in a Sentencing Hearing in Which a Substantial Liberty Interest Is at Stake.

The Second Circuit, in failing to apply the principles set forth by this Court in *Rovario* v. *United States,* 353 U.S. 53 (1957), has caused Fatico's due process rights to be violated herein.

In *Rovario,* this Court held that the lower court had committed error in the trial of a defendant for knowing possession and transportation of heroin when it allowed the government to refuse to disclose the identity of an undercover agent who had participated in the alleged events which led to defendant's conviction. The court defined the "informers privilege" and then noted that said privilege must give way if disclosure of the informant's identity is relevant and helpful to the defense:

> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." (at 60-61)

That is precisely the case here. Cross-examination of the anonymous informants is crucial to Fatico's defense against the charge that he is a "made" member of the Gambino Family. Fatico needs cross-examination to defend against

allegations that would, if proved, deprive him of five years of his liberty.*

The argument that *Rovario* is inapplicable in the context of a sentencing hearing was rejected by this Court in *Williams* v. *New York,* 337 N.Y. 241 (1949). In *Williams,* this Court held that a death sentence imposed by a trial judge upon a defendant convicted of first-degree murder could stand despite the jury's recommendation of life imprisonment, where the death sentence decision was based upon a probation department report concerning defendant's prior criminal activities *the accuracy of which was not challenged* although the trial judge, at the sentencing hearing, disclosed in open court that he would rely upon the report and indeed disclosed the material facts of the report on which he would rely (337 U.S. at 244). In these circumstances, this Court found no violation of due process by reason of the fact that defendant's counsel had neither confronted nor cross-examined the author of the probation department report:

> "The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refuse or discredit any of them by cross-examination or otherwise." (337 U.S. at 244)

In short, this court signified that although it is not a denial of due process in sentencing to rely on information supplied by unidentified sources where neither the defendant nor his counsel challenges the accuracy of such information; where, as in the case at bar, the proffered information is

* Without cross-examination, only one side of the story becomes apparent; how, then, can *any legitimate* conclusion be drawn from that.

challenged, due process and fundamental fairness require that the information be excluded unless the informants are subject to cross-examination.

Thus, in *Gardner* v. *Florida,* 430 U.S. 349 (1977), this Court stated:

> ". . . it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel . . ." (at 358).*

That due process, in the context of the case at bar, requires that Fatico be allowed to cross-examine the witnesses against him was further confirmed by this Court in *Specht* v. *Patterson,* 386 U.S. 605 (1967). In *Specht,* the petitioner was convicted under one statute for "taking indecent liberties", but sentenced under another statute (a Sex Offenders Act) which provided for an increased sentence (above the sentence sanctioned by the first statute) if the trial court were "of the opinion that any . . . person [convicted of specified sex offenses], if at large, constitutes a threat of bodily harm to members of the public". Petitioner received an increased sentence pursuant to the terms of the latter statute.

After noting that "there was no hearing in the normal sense, no right of confrontation and so on" (at 608), this Court sustained petitioner's argument that the Sex Offenders Act procedure violates due process because it allows the critical finding of "dangerousness" to be made without

* *Accord: Townsend* v. *Burke,* 334 U.S. 763 (1948); *United States* v. *Tucker,* 404 U.S. 443 (1972).

a hearing at which the defendant may confront and cross-examine adverse witnesses (at 608-611).

It is submitted that the *Specht* holding is dispositive in the case at bar. Here, just like the Sex Offenders Act condemned in *Specht,* 18 U.S.C. 3577, as applied in this case (and tracking the language of the *Specht* opinion at pages 608-611):

> "does not make the commission of a specified crime the basis for sentencing. It makes one conviction [for hijacking] the basis for commencing another proceeding [to determine whether Fatico is a "made" member of the Gambino Family]. That is a new finding of fact . . . that was not an ingredient of the offense charged."

Moreover, the argument that *Specht* is distinguishable because, in *Fatico,* 18 U.S.C. 3577 does not provide for an enhanced sentence over and above the sentence for hijacking is untenable. In real terms, in this case, as the district court made abundantly clear, the "real" sentence in the absence of a "3577" finding of organized crime would be one year, whereas the sentence imposed pursuant to a "3577" finding of organized crime would be six years. Thus a *five* year liberty interest is at stake here. Clearly, this five year differential negates any argument that Fatico has no more at stake in the "3577" hearing than he did at his criminal hijacking trial.

POINT II

The Ninth Circuit Has Specifically Held That a Criminal Defendant Is Entitled to Confront and Cross-Examine His Accusers in a Sentencing Hearing in Which a Substantial Liberty Interest Is at Stake.

The Second Circuit, in failing to apply the principles set forth by the Ninth Circuit in *United States* v. *Weston,* 448 F.2d 626 (9th Cir. 1971), has caused Fatico's due process right to be violated herein.

In *Weston,* the defendant was convicted of transporting heroin. After verdict, the trial court indicated that a minimum mandatory sentence of five years would be appropriate. However, the government requested a pre-sentencing report. The reporting officer stated in the report that he had interviewed F.B.I. agents who investigated defendant and that "in their opinion" she was a "chief supplier to the Western Washington area" (at 628). This assertion was challenged by defendant at the sentencing hearing. The trial court "accepted as true" the allegation (at 629) and, based thereon, imposed the maximum sentence of 20 years. After sentencing, the trial court ordered the government to submit to it *in camera* the confidential "factual material that support the conclusion set forth" (at 630). Subsequently, the trial court concluded that the subject allegation was confirmed by said material (at 630).

The Ninth Circuit vacated the sentence, holding that the "confidential factual material" noted above did not sufficiently corroborate the subject allegation:

> "In essence, then, what we have is a conviction at a trial providing all of the safeguards required by the Constitution, of an offense warranting, in the

> opinion of the trial judge, the minimum sentence of five years. This is followed by a determination, based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that Weston is probably guilty of additional and far more serious crimes, for which she is then given an additional sentence of fifteen years." (at 630-631)*

It is submitted that the information presented in this case from unsworn and faceless informants is of no more probative value than the similar information denounced in Weston; and that the sentence imposed by the district court should therefore be vacated.

POINT III

Similar Hearsay Assertions Made by Anonymous Informants Who Were Not Subject to Cross-Examination Are Not Sufficient to Corroborate One Another.

As is set forth *supra,* p. 5, the only evidence which the district court credited at Fatico's sentencing hearing was the information derived from anonymous informants. As the Second Circuit noted in its principal decision herein, decided August 13, 1979:

> "[the district court] found 'highly probative' the testimony of 'seven different government agents, four of them from the FBI, relying on a total of seventeen independent informants.' As he put it so well, 'Even if one or several of these experienced agents miscalculated the reliability of an informant, the large

* See also *United States* v. *Duardi,* 384 F. Supp. 874, 881 (W.D. Miss. 1974).

> number of agents and informants . . . greatly reduces the margin for error.'" (August 13, 1979 slip opinion, at 4191.) (Appendix "A" *infra,* page 9a).

It is submitted that the basic premise upon which Fatico was "convicted" of being a member of an organized crime family is that repetition of rumor somehow constitute "more reliable" evidence than the original rumor itself (see the Second Circuit August 13, 1979 slip opinion, at 4191).*

It is submitted that, both as a matter of logic and as a matter of constitutional law, corroborating evidence sufficient to establish the reliability of information derived from anonymous informants may not be supplied by further information derived from additional anonymous informants.

We submit that the district court is mistaken when it credits information of little quality simply because it is presented in great quantity. Indeed, as argued above, the *only* form of corroboration presented at the hearing was that the information of one undisclosed informant that Fatico is a member of the Gambino family "corresponds"

* The retired FBI agent who transmitted the assertions of the "Easter Sunday Informant" (upon which the Second Circuit relies at p. 4192 of its slip opinion), admitted, on cross-examination, when asked why the informant, with whom he had worked for over two years, had never indicated that Fatico was a member of the Gambino Family prior to about a month before the sentencing hearing, that he could provide no plausible explanation (H.19-20). In fact, he had little knowledge of the reliability of the informant in that he admitted that (1) he did not know what sort of "deal" the informant had with the F.B.I. (H. 16); and (2) did not known whether the informant was in trouble when he decided to "turn F.B.I.'s evidence" (H. 16-18). He did not know if the informant was biased against Fatico (H. 19). Indeed, he admitted that he knew nothing about the informant's credibility based upon the original circumstances of his employment by the F.B.I. (H. 18). Finally, he refused to give one example of an occasion on which the information supplied by the informant had been corroborated as reliable (H. 19-20).

with the information from another undisclosed informant. But one piece of information from an untested and undisclosed source cannot *corroborate* another piece of information from *another* untested and undisclosed source—in any logical or meaningful sense—any more than one unsubstantiated rumor can corroborate another.

We submit that this is the logical flaw in the district court decision which prevented it from finding that there was not sufficient evidence to establish that Fatico was a "made" member of the Gambino Family. We further submit that the district court recognized the flaw itself when it questioned the due process implications of its own decision.*

Based on the above, it is respectfully submitted that there was no corroboration of the information supplied by undisclosed informants presented at the sentencing hearing sufficient to overcome the Due Process and Confrontation Clause objections to the introduction of information supplied by undisclosed informants who are not available for cross-examination.

POINT IV

The Second Circuit Has Rendered a Decision on the "Jencks" Issue in Conflict With Decisions of Other Courts of Appeal.

In addition, it is submitted that Fatico has been deprived of liberty without due process of law by reason of the denial of his constitutional and statutory rights to be provided with "Jencks Act 3500" material for cross-examination purposes at his sentencing hearing.

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* Without cross-examination, only one side of the story becomes apparent; how, then, can *any legitimate* conclusion be drawn from that. It is *impossible* to test the truth of what government agents may testify that informants may have told them without cross-examination and "3500" disclosure.

The compelling and unique need for the production of "3500" material in the instant case is undeniable in view of the fact that the critical evidence at the sentencing hearing was rank hearsay, to wit, testimony by F.B.I. agents that undisclosed informants had told them that Fatico was a "member" of the "Gambino Family."

Indeed, the district court recognized this need:

> "The problem of defense counsel in probing for chinks in the armor of the prosecution witnesses was compounded by his inability to obtain prior statements of the law enforcement officials." (458 F.Supp. at 399)
>
> • • •
>
> "Unable to cross-examine the informants, the defendant's only hope was to attack the credibility of the Government agents by attempting to impeach them with their prior statements and reports. Without this limited weapon, the defendant remained virtually defenseless." (458 F. Supp. at 400)

This finding that "the defendant remained virtually defenseless" underscores the necessity of the production of "Jencks" material in a case such as this. Indeed, this would be a *minimum* requirement of due process.

Indeed, where, as in this case, the live witnesses were merely relating the extra-judicial assertions of undisclosed informants who are not subject to cross-examination, the need for the production of "Jencks" material reaches its most compelling stature. Only by use of such material can the cross-examiner hope to contest the live witness's version of what was told to him by an undisclosed informant at some distant point in time.

Even more importantly, only by use of such material can the cross-examiner hope to contest the truthfulness of

the assertions made by the undisclosed informants by means of evidence of bias, evidence of prior inconsistent statements, and other evidence contained in written reports of statements made by the undisclosed informants.

In *Jencks* v. *United States,* 353 U.S. 657 (1957), this Court recognized the crucial importance of prior written statements of witnesses for purposes of cross-examination. This Court did not, either expressly or by implication, limit its holding in *Jencks* to criminal "trials," per se.

Indeed, in *United States* v. *Covello,* 410 F.2d 536 (2nd Cir. 1969), the Second Circuit recognized that due process demands that a criminal defendant be allowed access to "Jencks" material for purposes of "trial," and indicated that a hearing might, in certain circumstances, constitute "so much an integral part of the criminal trial" that it should be considered a "trial" for "Jencks" purposes (410 F.2d at 544).

It is submitted that Fatico, at his sentencing hearing, had at stake an interest of immense importance which is equivalent to that risked by the accused at a criminal trial. He stood to lose five years of his life. Indeed, the sentencing hearing herein is a "trial" for all intensive purposes: (1) the critical fact on which *five* years of Fatico's life turns is litigated here; and (2) it is the end of the line since there are no further proceedings.

Although the Second Circuit found in this case that a *post-trial* sentencing hearing does not fall within the ambit of a "trial" for "Jencks" purposes, nevertheless, this decision is in conflict with the decision of another Court of Appeals.

Thus, in *United States* v. *White,* 342 F.2d 379 (4th Cir. 1965), the petitioner filed a 28 U.S.C. 2255 petition to vacate his conviction on various grounds. At a plenary hearing

on the petition, the district court granted petitioner's "3500" motion. The Court of Appeals indicated its approval of the district court decision that the Jencks Act was applicable. *Accord*: *United States* v. *Kelly,* 269 F.2d 448 (10th Cir. 1955).

These cases appear to recognize that the Jencks Act is applicable at a post-trial hearing where a significant liberty interest is at stake.

Finally, in *United States* v. *Murphy,* 569 F.2d 771 (3rd Cir. 1978), the Third Circuit, in *dicta,* stated:

> "There is some authority for requiring Jencks Materials at post-trial hearings . . . No issue concerning the availability of Jencks Materials in a post-trial evidentiary hearing is before us, and we leave its resolution to another day." (at 774)

Accordingly, it is submitted that there is a split among the Circuits on this important issue which should be resolved by this Court.

CONCLUSION

For the reasons stated above, a writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1092-93—August Term, 1978.

(Argued June 5, 1979 Decided August 13, 1979.)

Docket Nos. 79-1100, 79-2042

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL FATICO,

Appellant.

Before:

OAKES and MESKILL, *Circuit Judges,* and
STEWART, *District Judge.**

Appeal from a sentence imposed under 18 U.S.C. § 371 in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* following appellant's plea of guilty to charges of conspiring to receive goods stolen from interstate commerce. *Held,* the sentence is affirmed because reliance in sentencing on information from undisclosed informers was not a violation of due process, because there was sufficient corroboration of their in-

* Of the Southern District of New York, sitting by designation.

formation and sufficient evidence that appellant was a member of organized crime, and because the Government was not required under 18 U.S.C. § 3500 to disclose in the sentencing proceeding prior statements of law enforcement officers.

MICHAEL ROSEN, Saxe, Bacon & Bolan, P.C., New York, N.Y. (Roy M. Cohn and Howard F. Husum, of counsel), *for Appellant*.

PAUL F. CORCORAN, Special Assistant United States Attorney (Edward R. Korman, United States Attorney for the Eastern District of New York, and Harvey M. Stone, Assistant United States Attorney, of counsel), *for Appellee*.

OAKES, *Circuit Judge:*

This is the second appeal in connection with appellant's sentencing. The court imposed the sentence, four years' imprisonment to be served consecutively to another sentence imposed for a different crime, appeal as to which is pending, after a plea of guilty in the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge. The plea was to a conspiracy charge under 18 U.S.C. § 371 as a result of the hijacking of three trucks and their contents from John F. Kennedy Airport in violation of 18 U.S.C. § 659. Both appeals have arisen out of challenges by appellant's counsel to statements or suggestions in the presentence reports that ap-

pellant has strong ties to organized crime and is a "made" member of the Gambino organized crime family.

THE FACTS

Precipitating the first appeal, which was by the Government, was Judge Weinstein's holding that, although membership in and ties to organized crime are material facts to be considered in sentencing,[1] he would exclude as hearsay involving Due Process and Confrontation Clause limitations any evidence presented through an agent of the Federal Bureau of Investigation (FBI) from a reliable but confidential informer who was allegedly a member of the same New York organized crime "family." *United States v. Fatico,* 441 F. Supp. 1285 (E.D.N.Y. 1977). This court agreed that "[t]he Due Process Clause is plainly implicated at sentencing," *United States v. Fatico,* 579 F.2d 707, 711 (2d Cir. 1978) (*Fatico I*), but noted generally that it did not necessarily follow that Due Process required all the procedural safeguards and strict evidentiary limitations of the criminal trial itself. And we held specifically that *Williams v. New York,* 337 U.S. 241 (1949), permitting reliance on hearsay information even though the defendant could not confront or cross-examine the witnesses who supplied the information, was still viable despite *Gard-*

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1 This holding was based on 18 U.S.C. § 3577, which provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Appellant did not challenge the materiality of information as to his links to organized crime on either the former appeal or this one.

ner v. Florida, 430 U.S. 349 (1977) (plurality opinion), which held that Due Process guaranteed against the imposition of the death penalty on the basis of information not disclosed at all.[2] Thus we stated that

> Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means. Thus, the trial court erred in excluding the agent's testimony about the informer's declaration once the Government represented that it would produce the specified corroboration.

579 F.2d at 713 (footnotes omitted). Accordingly, we reversed the district court's exclusion of the evidence and remanded the cause for sentencing proceedings, but at the same time specifically stated that "the weight given to the informer's declarations and the

2 We distinguished *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion), from *Williams v. New York*, 337 U.S. 241 (1949), on the same ground as the Supreme Court itself noted in *Gardner*: the sentencing judge in *Williams* had disclosed the information, and the defendant had not challenged its accuracy, while the judge in *Gardner* had not even disclosed the information, and so the defendant could not challenge its accuracy. *United States v. Fatico*, 579 F.2d 707, 711-12 n.10 (2d Cir. 1978) (*Fatico I*). We also noted that to the extent, if any, that *Gardner* did limit *Williams*, the limitation applied only to capital cases, citing *Gardner*, 430 U.S. at 356, 359, 360, 363-64. *Fatico I, supra*, 579 F.2d at 711-12 n.10.

We also relied upon various cases in the circuit courts sustaining the admission of hearsay where the defendant did not dispute the information, *United States v. Bass*, 535 F.2d 110, 120-21 (D.C. Cir. 1976), or other evidence "sufficiently corroborated" the hearsay information, *United States v. Needles*, 472 F.2d 652, 659 (2d Cir. 1973). *See also United States v. Weston*, 448 F.2d 626, 634 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972). *Fatico I, supra*, 579 F.2d at 712-13.

assessment of credibility are matters for the sentencing court." *Id.* at 713 n.14.[3]

On remand, the district court held an evidentiary sentencing hearing at which the Government called ten witnesses, seven of whom were law enforcement agents (four with the FBI). The law enforcement officers' testimony indicated that seventeen different informers had told them that appellant and his brother were long-time, active members of the Gambino family. The Gambino family is one of the five active organized crime families operating in the greater New York City metropolitan area. There was also information to the effect that appellant was a "made" member, that is, one who has officially been initiated as a full-fledged member of the family, not born into it but not merely associated with it. Largely on the strength of this testimony,[4] which the court found "highly probative," *United States v. Fatico*, 458 F. Supp. 388, 412 (E.D.N.Y. 1978), the

3 This court did not express any views on the sentence to be imposed but did state that it did "not understand" the trial judge's statement that at stake was the difference between freedom and up to five years in prison. We believed that the proffered testimony on organized crime ties did not appear to alter significantly "the picture already on the record of the type of crime involved, the role of defendants as revealed at the trial and their prior conduct." *Fatico I, supra*, 579 F.2d at 714 n.17.

4 There was also testimony by one law enforcement officer that on more than one occasion he observed appellant with known members of organized crime. Two unindicted coconspirators, with extensive criminal records and under the Government's witness protection program, also testified as to the Fatico brothers' links to the Gambino family. The trial judge largely disregarded this latter testimony, as he did the testimony that the brothers attended a closed wake for a Gambino family member and evidence of appellant's prior arrests on a variety of other charges, *United States v. Fatico*, 458 F. Supp. 388, 412 (E.D.N.Y. 1978), none of which we fault.

court, after numerous holdings of law,[5] said: "While we must remain dubious of any conclusions based upon hearsay, the Government's proof here meets the rigorous burden of 'clear, unequivocal and convincing evidence.' The probability is at least 80% that defendant is an active member of an organized crime family." *Id.*

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5 The holdings included:

(1) Sentencing is a critical stage of the criminal process. 458 F. Supp. at 396.

(2) The purpose of the 1975 amendments to Fed. R. Crim. P. 32(c)(3)(A) (mandatory disclosure to defendant or his counsel of presentence reports) reflects the importance of reliable information as a basis for proper sentencing. 458 F. Supp. at 396-97.

(3) Due process does apply to sentencing, and the reliability of factual information is important to sentencing determinations. *Id.* at 397-98.

(4) Defendants lack protection because (a) *Fatico I, supra*, held that they cannot confront informers and (b) a line of cases in the Second Circuit, *see* note 8 *infra*, has held that defendants cannot obtain under 18 U.S.C. § 3500 prior statements of the law enforcement officials. *Id.* at 399-400.

(5) Defendants have an important liberty interest at sentencing, *id.* at 400, especially if they are treated as "special offenders" in the prison system, *see* text at notes 6-8 *infra*. *Id.* at 401-02.

(6) The burden of proof in these proceedings could run a continuum from a "preponderance" of the evidence, to "clear and convincing" evidence, to "clear, unequivocal and convincing evidence," to "proof beyond a reasonable doubt," *id.* at 402-05, all of which may be numerically quantified in terms of probabilities.

(7) Although the provisions in the Organized Crime Control Act of 1970 for sentencing "dangerous special offenders," note 6 *infra*, require proof of status only by a preponderance of the evidence, 458 F. Supp. at 406-07, where, as here, a higher sentence is based on proof of a fact not established in a criminal trial, proof should be by "clear, unequivocal and convincing evidence," which on a quantifiable scale of probability is "above 80%," *id.* at 408-12.

The court then sentenced appellant to four years' imprisonment out of a maximum of five, 18 U.S.C. § 371, to run consecutive to a three-year sentence imposed in the Eastern District on a federal gambling charge, 78 Cr. 19-1 (E.D.N.Y.), a conviction now on appeal. Doing so, however, the court stated that "[w]ere it not for the organized crime issue, defendant would have been sentenced in the hijacking case to no more than a three year term, concurrent with the gambling sentence," 458 F. Supp. at 412. The court went to some length to point out how the organized crime characterization was very likely to have a number of serious ramifications for appellant in prison, including designation as a "special offender"[6] under Correction Authority and Parole Board decisions, with resultant confinement in a high security facility and ineligibility for certain rehabilitative programs, early parole,[7] and other privileges.[8] *See generally Cardaropoli v. Norton*, 523 F.2d 990 (2d Cir. 1975).

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6 Distinguish a "dangerous special offender" under 18 U.S.C. § 3575(b), *see United States v. Bowdach*, 561 F.2d 1160, 1171 (5th Cir. 1977). The dangerous special offender may be subject to 25 years' imprisonment above and beyond his ordinary sentence.

7 The district court pointed out that the "parole guidelines" for the gambling conviction were 12 to 16 months, 458 F. Supp. at 413, although it did not mention what they would have been for concurrent hijacking *and* gambling convictions.

8 The court also expressed some dissatisfaction with the decision in *Fatico I, supra*, and the line of decisions in this court holding that the Jencks Act, 18 U.S.C. § 3500, applies only at trial, *e.g.*, *United States v. Sebastian*, 497 F.2d 1267 (2d Cir. 1974); *United States v. Percevault*, 490 F.2d 126 (2d Cir. 1974); *United States v. Covello*, 410 F.2d 536 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969), as not in compliance with the "high standards of due process expected from this country's courts." 458 F. Supp. at 412. *See generally id.* at 399-400.

Appendix "A"

We affirm the decision below imposing sentence, by no means, however, endorsing all the rules of the district court.

DISCUSSION

Appellant raises five points on appeal:

1. The court's admission of evidence based on information derived from undisclosed informers coupled with the Government's refusal to provide counsel with "3500" material, 18 U.S.C. § 3500, denied appellant due process.

2. Under *Fatico I, supra,* there was insufficient evidence to corroborate the information that the undisclosed informers supplied.

3. Under the trial court's "clear, unequivocal and convincing evidence" standard, there was insufficient evidence that appellant was a "made" member or an important figure in the upper echelons of the Gambino family.

4. The proper burden of proof was upon the Government and in any event was "beyond a reasonable doubt."

5. Appellant was entitled to Jencks Act or "3500" material, *viz.*, prior statements of the law enforcement agents testifying at the sentencing hearing.

The first point has been answered adversely to appellant in *Fatico I, supra,* and by the line of cases in note 8 *supra*.

On the second point there was more than ample evidence to corroborate under *Fatico I, supra,* 579

Appendix "A"

F.2d at 713, the information that the undisclosed informers supplied. We suggested in *Fatico I* that sufficient reliability was apparent from corroboration by testimony of the two coconspirators, the nature of the crime itself (armed hijacking of valuable truck loads requiring sophisticated fencing through quasi-legitimate and criminal business groups, of which Judge Weinstein had earlier taken judicial notice, 441 F. Supp. at 1288), and in-court testimony of those who observed appellant and his brother associating with members of the Gambino family. Although Judge Weinstein rejected the testimony of the coconspirators as essentially unreliable, 458 F. Supp. at 412, and did not refer at all to the nature of the crime itself, he found "highly probative" the testimony of "seven different government agents, four of them from the FBI, relying on a total of seventeen independent informants." As he put it so well, "Even if one or several of these experienced agents miscalculated the reliability of an informant, the large number of agents and informants . . . greatly reduces the margin for error." *Id.* Appellant argues that quantity may not make up for quality of evidence. But under *Williams v. New York, supra,* as well as *Fatico I,* hearsay evidence is admissible if reliable. And although it is also possible that ten persons who have heard the same rumor may each be wrong, here we recognize that there are other independent facts, including personal observations and the nature of the crime itself, that go to corroborate the informers' statements.

The third argument is somewhat more pointed. Appellant argues that the evidence did not show that he was a "made" member of the Gambino family. Ac-

cording to the testimony appellant was one of some 1,100 "made" "soldiers" or "buttons" in the Gambino family. One of the informers, who a retired FBI agent testified was himself a "reliable, long active and highly placed member of the Gambino family," 458 F. Supp. at 392, told the agent on Easter Sunday 1978 that the Fatico brothers had been such members for over twenty years. There was much other testimony to the same effect as well as testimony that the Fatico brothers, operating with a crew of associates out of the Bergen Hunt and Fish Club in Ozone Park, New York, ran gambling, loan sharking, truck hijacking, and other illegal enterprises which are frequently a hallmark of organized crime.

On the fourth point, we do not agree that the burden of proof on the Government should be "beyond a reasonable doubt." Such a standard would turn sentencing hearings into second trials. As Judge Friendly said of sentencing hearings in *Hollis v. Smith,* 571 F.2d 685, 693 (2d Cir. 1978), although expressly noting Judge Weinstein's opinion leading to *Fatico I,* 441 F. Supp. 1285, "[t]here is no authority binding upon us which holds that the procedure in proceedings relating solely to punishment, even when an additional fact has to be established, must conform precisely to those in proceedings relating to guilt, and we see no basis in principle for so holding." We believe that *Fatico I, supra,* is a sufficient answer to appellant's fourth point.[9]

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9 We note the Government's request, even though it did not file a cross-appeal, that we reject not only the burden of proof standard that the district judge utilized but also the entire concept of a hearing, which apparently is now called in the criminal bar a *"Fatico* hearing," in sentencing matters altogether. We decline as unnecessary to this decision to adopt any standard of proof

The fifth point on this appeal in respect to the Jencks Act is in reality an attempt to have us overturn *United States v. Sebastian,* 497 F.2d 1267 (2d Cir. 1974), *United States v. Percevault,* 490 F.2d 126 (2d Cir. 1974), and *United States v. Covello,* 410 F.2d 536 (2d Cir.), *cert. denied,* 396 U.S. 879 (1969), something that we cannot do absent treatment of the issue en banc. *Compare United States v. Murphy,* 569 F.2d 771, 774 n.11 (3d Cir.), *cert. denied,* 435 U.S. 955 (1978).

Judgment affirmed.

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or reject any standard except "proof beyond a reasonable doubt." And although we do not believe that a sentencing hearing will be necessary every time a defendant disputes facts or statements in the presentence report, we certainly would not hold it an abuse of discretion on the part of a district judge to hold such a hearing where there is reason to question the reliability of material facts having in the judge's view direct bearing on the sentence to be imposed, especially where those facts are essentially hearsay. Indeed, the statute permitting appeal from the suppression of evidence at a sentencing hearing, 18 U.S.C. § 3731, on which the Government relied in appealing in *Fatico I, supra,* recognizes that such a hearing may be required in some cases. The thrust of *United States v. Bass,* 535 F.2d 110, 120-21 (D.C. Cir. 1976), *United States v. Needles,* 472 F.2d 652, 659 (2d Cir. 1973), and *United States v. Weston,* 448 F.2d 626, 634 (9th Cir. 1971), *cert denied,* 404 U.S. 1061 (1972), as well as of *Hollis v. Smith,* 571 F.2d 685, 695-96 (2d Cir. 1978), is to the same effect. The Government suggests that all that these cases—and *Fatico I*—mean is that the Government has the opportunity at such a hearing to "amplify" its information furnished, and not that the defendant must be given an opportunity to test that information by cross-examination. We cannot accept any such narrow view as a per se rule for the conduct of these hearings; we would have the same trouble with the proposed rule as Judge Weinstein had with our decision in *Fatico I, supra. See* note 8 *supra.*

APPENDIX "B"

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October, one thousand nine hundred and seventy-nine.

Present:

HON: JAMES L. OAKES,
HON: THOMAS J. MESKILL,
Circuit Judges,

HON: CHARLES E. STEWART,
District Judge.

79-1100

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL FATICO, a/k/a "Danny Fatico",

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appllant, Daniel Fatico.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX "C"

SENTENCING HEARING EVIDENCE

Pursuant to the Second Circuit's directive, an evidentiary hearing was held to determine whether Fatico (1) was a "made" member of the "Gambino Family", and (2) an important figure in the upper echelons of the "Gambino Family."

The evidence is hereinafter summarized under the following categories: (1) information from undisclosed informants; (2) accomplice/co-conspirator testimony; (3) police officer "association" testimony; and (4) Fatico's criminal record. An analysis of the evidence, from a corroboration standpoint, follows the summary.

1. INFORMATION FROM UNDISCLOSED INFORMANTS

JOSEPH FANNING

Fanning, a former F.B.I. agent, testified that an undisclosed informant, who was allegedly a "high-up" member of the "Gambino Family" (H. 9), told him on Easter Sunday, 1978, that Fatico was a member of the "Gambino Family" (H. 13).*

On cross-examination, Fanning admitted that he had no personal knowledge of the above fact (H. 15-16). When asked why the informant, with whom he had worked for over two years, had never indicated that Fatico was a member of the Gambino Family prior to about a month before the sentencing hearing, Fanning could provide no plausible explanation (H. 19-20). In fact, Fanning had little knowledge of the reliability of the informant in that Fanning admitted that (1) he did not know what sort of "deal" the informant had with the F.B.I. (H. 16); and (2) did not know whether the informant was in trouble when he

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* "H" references refer to pages of the transcript of the sentencing hearing of July 7, 1978.

decided to "turn F.B.I.'s evidence" (H. 16-18). He did not know if the informant was biased against Fatico (H. 19). Indeed, Fanning admitted that he knew nothing about the informant's credibility based upon the original circumstances of his employment by the F.B.I. (H. 18). Finally, Fanning refused to give one example of an occasion on which the information supplied by the informant had been corroborated as reliable (H. 19-20).

In addition, the Government refused to have over "3500" material written by Fanning (H. 23-25).

MARTIN BOLAND

Boland, a present F.B.I. agent, testified that an undisclosed informant told him in 1973 that Fatico was a soldier in the Gambino Family (H. 35), and that Fatico was involved in hijacking and gambling (H. 38).

On cross-examination, Boland admitted that he had no personal knowledge of the accusations made (H. 55). He refused to disclose when or under what circumstances he began to work with the informer (H. 55-56). He refused to disclose whether the informer was "in trouble" (H. 57). And he refused to indicate what "deal" the informant had with the Government (H. 58). He admitted the informer was paid (H. 58). Counsel for Fatico indicated that he was unable to meaningfully cross-examine Mr. Boland in view of the Government's refusal to provide "3500" material or to disclose the history of the informant (H. 58-59).

Boland admitted that he kept records of what the informant had told him (H. 44-45).

JOSEPH KEATING

Keating, a present F.B.I. agent, testified that he himself had "developed" the informant in question (H. 61). The informant told him that Fatico operated a gambling operation (H. 64), and also paid off police officers in connection therewtih (H. 65, 74). The informant "believed" that

Fatico was a member of the Gambino Family (H. 65), based on the opinion of others (H. 65-66).

On cross-examination, Keating admitted he had no personal knowledge of the accusation (H. 68). He couldn't recall when his informant first told him about Fatico (H. 70). In regard to the alleged "pay-offs", Keating admitted that he *never* attempted to discover who the "paid-off" policeman was (H. 73-75). He also admitted the "pay-off" allegation was never confirmed (H. 75).

In addition, counsel for Fatico was denied access to the "3500" reports made by Keating (H. 69-70).

CHARLES BOLING

Boling, a present F.B.I. agent, testified that an undisclosed informant had told him that Fatico was "involved" with organized crime (H. 79-80), and with other illegal activities (H. 80).

On cross-examination, Boling admitted that he had no personal knowledge of the accusations (H. 83). The informant was paid at least $4,000 for information (H. 82). Boling refused to answer whether the informant had been in trouble while working as an informer (H. 83).

ROBERT JOHN

John, a detective investigator for the Suffolk County D.A.'s Office, basically testified about Carmine Fatico, Dainel's brother (H. 160).

JOHN CAPOBIANCO

Capobianco, a detective for the New York City Police Department, testified that, in his opinion, Fatico was a "button" in the Gambino Family (H. 184). This opinion was admittedly based on information from eight informants (H. 185). He could not remember when he was told that

Fatico was a "button"; but believed it was in the early '70's (H. 188).

On cross-examination, Capobianco admitted that the information provided by his eight informants resulted only in gambling convictions against Fatico (H. 199). The "loan sharking" charges against Fatico were never followed up (H. 200-201). He also admitted that his informants could never have personal knowledge of whether Fatico was a "made" member of the Gambino Family because "they don't even get near the ceremony" (H. 203). Indeed, Capobianco admitted that the only proof besides "street talk" he had to establish that Fatico was a "made" member of the Gambino Family was "how much respect he gets" (H. 204).

> Q. So Detective, is it your testimony that after 19 years on the Police Force, specializing in organized crime, at least to some extent, you made decisions in labelling human beings on whether the car door is opened or not opened for them?
>
> A. When it comes to organized crime, yes, sir.

In addition, Capobianco admitted that many of his informants were "in trouble" (H. 206). He also admitted that he would advise the D.A.'s office that they were "cooperating" (H. 211).

Finally, he *expressly* admitted that:

> "these [informers] are guys that walked in, and they had beefs against this guy and that guy and in between and they want to settle a beef" (at 208).

2. ACCOMPLICE/CO-CONSPIRATOR TESTIMONY

Salvatore Montello

Montello has been in the witness protection program for 3 years (H. 88). He admits that he was in the Colombo

Family, not the Gambino Family (H. 89, 109). Although he states that Fatico was a member of the Gambino Family (H. 94), he admits that his only bases for that conclusion are unsubstantiated rumor, "street talk" (H. 95, 109), and the respect accorded to Fatico (H. 95). Finally, he admitted that he doesn't know how members are "made" (H. 98, 109), and that he had no idea when Fatico was "made" (H. 114).

Manuel Llauget

Llauget, like Montello, has been in the witness protection program for 3 years (H. 124), a ward of the government. He testified that he, Fatico and certain other persons had a "sit down" before Aniello Dellacroce (H. 141-142).

On cross-examination, he admitted that he is being paid $700 a month by the government (H. 153).

3. POLICE OFFICER "ASSOCIATION" TESTIMONY

John Capobianco

Capobianco testified that Daniel Fatico was arrested in a crap game with "members of organized crime" (H. 192).

On cross-examination, Capobianco could not remember the names of the "members of organized crime" Daniel Fatico was arrested with (H. 205). He stated that Detective McCabe had the list (H. 205). As shown below, Daniel Fatico was not on that list (see H. 215, where the arrestees are enumerated).

Kenneth McCabe

McCabe, a New York City police officer and Capobianco's partner (H. 217), testified as to the persons arrested at the Ravenite Social Club (H. 218-223). Daniel Fatico was not among the arrestees.

Appendix "C"

However, McCabe did testify that he saw Daniel Fatico with "members of organized crime" at "crap games", which he ran (H. 224-225). He also testified that he saw Daniel Fatico at Carlo Gambino's wake (H. 225), although he admitted that 40% of the people at that wake were not "members of organized crime" (H. 227).

On cross-examination, McCabe admitted that the only source (besides his opinion) he has for identifying "members of organized crime" is "confidential information" (H. 230).

In addition, "3500" material was refused (H. 233).

4. FATICO'S CRIMINAL RECORD

No evidence was presented on this point.

5. THE DENIAL OF "3500" MATERIAL AT THE SENTENCING HEARING

The Government refused to turn over "3500" material for each and every witness presented. Such material is particularly critical in this case, where the "undisclosed informant" is not presented for cross-examination. For example, in the case of Fanning, (*supra*), it would be relevant to determine whether Fanning had made a record of the Easter Sunday, 1978 revelation that Fatico was a member of the Gambino Family. With respect to Boland, (*supra*), it would be relevant to determine *when* the subject disclosure was made. With respect to John, (*supra*), it would be relevant to inquire why Fatico was never mentioned in the written reports, (see H. 166), if he was supposed to be an "important criminal". With respect to Capobianco (*supra*), *especially,* it would be relevant to study the reports, since they are one of the bases upon which Capobianco reached his "opinion" that Fatico was a member of organized crime (the other two bases being informants and surveillance) (See H. 195).

Appendix "C"

6. ANALYSIS OF THE EVIDENCE ADDUCED AT THE SENTENCING HEARING

a. *information from undisclosed informants*

From the foregoing summary it is evident that: (1) no person in this category who testified at the hearing asserted that he had personal knowledge that Fatico was a member of the Gambino Family; (2) no person in this category who testified at the hearing presented information which independently corroborated any assertion made by any undisclosed informant that Fatico was a member of the Gambino Family; and (3) no person in this category who testified at the hearing explained the *basis* for his informant's assertions about Fatico.

The *only* form of "corroboration" presented is that the information of one undisclosed informant that Fatico is a member of the Gambino Family "corresponds" with the information of another undisclosed informant. But one piece of information from an untested and undisclosed source cannot *corroborate* another piece of information from *another* untested and undisclosed source—in any logical or meaningful sense—any more than one unsubstantiated rumor that the sky is purple can corroborate another unsubstantiated rumor that the sky is purple.

b. *accomplice/co-conspirator testimony*

Although Montello states that Fatico is a member of the Gambino Family, he admits that the only basis for his conclusion is unsubstantiated rumor and street talk. Llauget never even specifically stated that Fatico was a member of the Gambino Family.

Appendix "C"

More importantly, these two accomplice witnesses, whom the Government itself characterized as "unworthy of belief" at the 1976 trial and who the jury evidently did not believe since it was deadlocked, are simply not worthy of belief in this sentencing hearing.

Their testimony should not be sufficient to corroborate anything.

c. *police officer "association" testimony*

Capobianco testified that Fatico was arrested in a crap game with "members of organized crime", but could not identify who said "members" were. McCabe likewise testified that he saw Fatico with members of organized crime at crap games. He also testified that he saw Fatico at Carlo Gambino's wake.

Assuming *arguendo* the truth of these assertions, what does it prove. It certainly does not prove that Fatico was a member of the Gambino Family. It merely shows that he liked to gamble.

Clearly, this evidence does not corroborate the assertion made by undisclosed informants that Fatico was a member of the Gambino Family.

d. *Fatico's criminal record*

No direct evidence was presented on this point. However, even if such evidence were presented, it is clear that such evidence would be insufficient to corroborate that Fatico was a member of the Gambino Family. As a matter of fact, the District Court rejected the probative force of Fatico's prior record on this point when it held that his record is ambiguous on the issue of organized crime and is often "the hallmark of an incompetent individual hoodlum" (458 F. Supp. at 412).

APPENDIX "D"

Title 18 United States Code, Section 3500 provides:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is

withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared. . . ."

Supreme Court, U. S.
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No. 79-789

In the Supreme Court of the United States

OCTOBER TERM, 1979

DANIEL FATICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statement 2

Argument 3

Conclusion 12

CITATIONS

Cases:

Beavers v. *United States*, 351 F. 2d 507 12

Farrow v. *United States*, 580 F. 2d 1339 ..... 7, 9

Gardner v. *Florida*, 430 U.S. 349 ..... 4, 6, 7

McCray v. *Illinois*, 386 U.S. 300 9

Presnell v. *Georgia*, 439 U.S. 14 ..... 4, 7

Roviaro v. *United States*, 353 U.S. 53 9

Smith v. *United States*, 551 F. 2d 1193, cert. denied, 434 U.S. 830 4

Specht v. *Patterson*, 386 U.S. 605 7

United States v. *Ashley*, 555 F. 2d 462, cert. denied, 434 U.S. 869 8

United States v. *Barnett*, 587 F. 2d 252, cert. denied, No. 78-1267 (Apr. 23, 1979) 8

United States v. *Bernard*, No. 78-3033 (9th Cir. Sept. 27, 1979) 11

Page

Cases—(Continued):

United States v. *Cardi*, 519 F. 2d 309 8

United States v. *Covello*, 410 F. 2d 536, cert. denied, 396 U.S. 879 12

United States v. *Garcia*, 544 F. 2d 681 ..... 4, 8

United States v. *Grayson*, 438 U.S. 41 6

United States v. *Kelly*, 269 F. 2d 448, cert. denied, 362 U.S. 904 12

United States v. *McMillen*, 489 F. 2d 229, cert. denied, 410 U.S. 955 11

United States v. *Montos*, 421 F. 2d 215, cert. denied, 397 U.S. 1022 11-12

United States v. *Murphy*, 569 F. 2d 771, cert. denied, 435 U.S. 955 11

United States v. *Needles*, 472 F. 2d 652 ..... 8, 11

United States v. *Percevault*, 490 F. 2d 126 11

United States v. *Sebastian*, 497 F. 2d 1267 11

United States v. *Spagnuolo*, 515 F. 2d 818 11

United States v. *Tucker*, 404 U.S. 443 6

United States v. *Weston*, 448 F. 2d 626, cert. denied, 404 U.S. 1061 ..... 8, 9

United States v. *White*, 342 F. 2d 379, cert. denied, 382 U.S. 871 12

Page

Cases—(Continued):

United States v. *Wondrack*, 578 F. 2d 808 ..... 8, 9

Williams v. *New York*, 337 U.S. 241 ..... 5, 7, 9

Williams v. *Oklahoma*, 358 U.S. 576 5

Constitution, statutes and rule:

United States Constitution, Fifth Amendment, Due Process Clause 2, 4

Jencks Act, 18 U.S.C. 3500 ..... 2, 10

18 U.S.C. 3500(a) 11

18 U.S.C. 3500(e) 11

18 U.S.C. 371 2

18 U.S.C. 3577 4

28 U.S.C. 2255 12

Fed. R. Crim. P. 32(c)(3)(A) 8, 9

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 603 F. 2d 1053. The opinion of the district court is reported at 458 F. Supp. 388. Prior opinions of the court of appeals and of the district court are reported respectively at 579 F. 2d 707 and 441 F. Supp. 1285.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1979. A petition for rehearing was denied on October 5, 1979 (Pet. App. 12a). On October 29, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 20, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in imposing sentence, the district court properly considered hearsay evidence of petitioner's involvement in organized crime.

2. Whether the Jencks Act, 18 U.S.C. 3500, applies at a sentencing proceeding to require production of information provided by confidential informants to law enforcement officers who testify at the sentencing hearing.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of New York on various charges arising from the hijacking of three trucks and their contents at Kennedy Airport in New York. Petitioner eventually pleaded guilty to one count of conspiracy to possess items stolen from a foreign shipment, in violation of 18 U.S.C. 371, and was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 1a-11a).

1. In connection with petitioner's sentencing, the government advised the district court that it intended to introduce information from confidential informants, through the testimony of FBI agents, that petitioner was a member of an organized crime family (Pet. App. 3a). The district court refused to allow such evidence. *United States* v. *Fatico*, 441 F. Supp. 1285 (E.D.N.Y. 1977). On the government's appeal, the court of appeals reversed. Although recognizing that the Due Process Clause was implicated at sentencing, the court held that not all evidentiary limitations applicable at trial were required to be observed at the sentencing stage and that the hearsay testimony contemplated by the government's proffer would be admissible if sufficiently corroborated. *United States* v. *Fatico*, 579 F. 2d 707, 711-713 (2d Cir. 1978); see also Pet. App. 3a-5a.

2. On remand, the district court held an evidentiary hearing at which seven law enforcement officers (including four FBI agents) testified (Pet. App. 5a). These officers collectively related information from 17 different informants that petitioner was a full member of the Gambino family, one of the five organized crime families in the New York metropolitan area (*ibid*; see also *United States* v. *Fatico*, 458 F. Supp. 388, 412 (E.D.N.Y. 1978)). The district court found this testimony "highly probative. Even if one or several of these experienced agents miscalculated the reliability of an informant, the large number of agents and informants, greatly reduces the margin for error." 458 F. Supp. at 412. The district court concluded that this proof met the government's "rigorous burden" to provide " 'clear, unequivocal and convincing evidence,' " and it found that the "probability is at least 80% that [petitioner] is an active member of an organized crime family." *Ibid.* As a result, instead of sentencing petitioner to a three-year term concurrent with a prior sentence on a federal gambling conviction, the district court imposed a sentence of four years' imprisonment consecutive to the earlier sentence. *Id.* at 412-413; Pet. App. 7a. The court of appeals affirmed, rejecting petitioner's claims that the use of the hearsay testimony deprived him of due process and that the Jencks Act was applicable at the sentencing hearing (Pet. App. 1a-11a).

ARGUMENT

1. Petitioner contends that the sentencing proceeding deprived him of due process because he was not afforded an opportunity to cross-examine the confidential informants whose information was conveyed through the testimony of the FBI agents (Pet. 11-16) and because the

hearsay evidence was not sufficiently reliable to be admitted at the sentencing proceeding (Pet. 16-18).[1]

The court of appeals agreed with petitioner that "'[t]he Due Process Clause is plainly implicated at sentencing'" (Pet. App. 3a, quoting *United States* v. *Fatico*, 579 F. 2d 707, 711 (2d Cir. 1978)). "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). Cf. *Presnell* v. *Georgia*, 439 U.S. 14, 16 (1978). However, "[t]he fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights." *Gardner* v. *Florida*, *supra*, 430 U.S. at 358 n.9.

It is well settled that the Due Process Clause does not prohibit the use of hearsay evidence at a sentencing proceeding or require that the convicted defendant be allowed to cross-examine the source of such information. "[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may,

[1]As the court of appeals noted (Pet. App. 3a n.1), petitioner does "not challenge the materiality of information as to his links to organized crime * * *." Nor could such an objection be sustained in light of 18 U.S.C. 3577, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Section 3577 "was enacted in order to clearly authorize the trial judge to rely upon information of alleged criminal activity for which the defendant had not been prosecuted * * *." *Smith* v. *United States*, 551 F. 2d 1193, 1196 (5th Cir.), cert. denied, 434 U.S. 830 (1977). See also *United States* v. *Garcia*, 544 F. 2d 681, 684 (3d Cir. 1976).

consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959). As the Court explained in *Williams* v. *New York*, 337 U.S. 241, 246-247, 249-250 (1949) (footnotes omitted):

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
>
> * * * * *
>
> Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly

relevant—if not essential to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

* * * * *

To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.

See also *United States* v. *Grayson*, 438 U.S. 41, 49 (1978). Thus, "before making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972), quoted in *United States* v. *Grayson*, *supra*, 438 U.S. at 50.[2]

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[2]As *Grayson* indicates, *Gardner* v. *Florida* does not repudiate this longstanding rule of due process. The court of appeals correctly observed (Pet. App. 4a n.2) that the judge in *Gardner* had not disclosed the substance of the hearsay evidence, while in *Williams* v. *New York* "the material facts * * * were described in detail by the trial judge in open court" (430 U.S. at 356). Moreover, the decision in *Gardner* seems limited, as the court of appeals concluded (Pet. App. 4a n.2), to capital cases. See 430 U.S. at 357-358; see also *Presnell* v. *Georgia*, *supra*, 439 U.S. at 16 ("These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial *in a capital case* than they do in the guilt-determining phase of any criminal trial. Cf. *Gardner* v. *Florida*, 430 U.S. 349 (1977).") (emphasis added).

This Court and the courts of appeals have uniformly held that a sentencing judge may consider hearsay evidence, analogous to the evidence in this case, that the defendant was associated with organized crime or was a ringleader in extensive criminal activity, that he constituted a danger to society, or that he had committed unrelated crimes for which he had not been convicted. See, *e.g.*, *Williams* v. *New York*, *supra*, 337 U.S. at 244 (information that defendant had committed 30 burglaries for which he had not been convicted and that he was a "menace to society"); *Farrow* v. *United States*, 580 F. 2d 1339, 1353-1354 n.25, 1359-1360 (9th Cir. 1978) (information that defendant was the ringleader of a large

Nor, contrary to his assertion (Pet. 13-14), is petitioner's position supported by *Specht* v. *Patterson*, 386 U.S. 605 (1967). In that case, the defendant was convicted of the crime of indecent liberties, which conviction served as the predicate for a separate commitment proceeding and sentence under the Sex Offenders Act. The Court framed the issue presented in *Specht* as "whether the rule of * * * [*Williams* v. *New York*] applies to this * * * case * * *" (386 U.S. at 607). The Court expressly adhered to its decision in *Williams* (386 U.S. at 608) but declined to extend the *Williams* rule to a case where, akin to a recidivist or habitual offender statute (386 U.S. at 610), "[t]he Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act" (386 U.S. at 608). Since the present case involves only a single statutory proceeding, petitioner's reliance on *Specht* is unavailing. Rather, petitioner is in the same position as any defendant faced at sentencing with damaging information about his background, and this case is controlled by the *Williams* rule as explicitly reaffirmed in *Specht*.

narcotics operation); *United States* v. *Wondrack*, 578 F. 2d 808, 809-810 (9th Cir. 1978) (report that defendant convicted of attempted tax evasion had received substantial income from trafficking in narcotics); *United States* v. *Ashley*, 555 F. 2d 462, 466 (5th Cir.), cert. denied, 434 U.S. 869 (1977) (information regarding defendant's prior conduct); *United States* v. *Garcia*, 544 F. 2d 681, 684 (3d Cir. 1976) (allegations concerning unrelated criminal conduct); *United States* v. *Cardi*, 519 F. 2d 309, 313 (7th Cir. 1975) (information regarding defendant's associates, sources of income, and prior criminal conduct); *United States* v. *Needles*, 472 F. 2d 652, 657-658, 659 (2d Cir. 1973) (report that defendant was engaged in widespread manufacture and sale of firearms).

The rule consistently recognized in these and other decisions is that due process is satisfied where the court determines that the hearsay is reliable, and the defendant is given the opportunity to rebut the accuracy of the information. However, "[t]he right of rebuttal does not require that the sentencing hearing be transformed into a second trial. * * * At a minimum, it is sufficient if the sentencing judge affords the defendant an opportunity to comment on any alleged factual inaccuracies." *United States* v. *Barnett*, 587 F. 2d 252, 259-260 (5th Cir. 1979) (citations omitted), cert. denied, No. 78-1267 (Apr. 23, 1979). See also Fed. R. Crim. P. 32(c)(3)(A) ("[T]he court shall afford the defendant or his counsel an opportunity to comment [on the presentence report] and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.").[3]

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[3] *United States* v. *Weston*, 448 F. 2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), on which petitioner relies (Pet. 15-16), is not to the contrary. Unlike the instant case (see page 10, *infra*), the court in *Weston* found that the hearsay statements at issue there were uncorroborated and unverified (448 F. 2d at 630-631) and that

Moreover, there was a compelling reason in this case to allow the use of hearsay evidence. To have required the confidential informants to appear for cross-examination by petitioner would have ignored the strong societal interest in protecting the safety and anonymity of such informants. The danger of retaliation against persons who provide information concerning alleged organized crime figures is especially acute. These considerations are recognized in Fed. R. Crim. P. 32(c)(3)(A), which, as amended in 1974, provides that the defendant or his counsel shall be allowed to read the presentence report, "but not to the extent that in the opinion of the court the report contains * * * any * * * information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." In this context, there is particular force to the concern "that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." *Williams* v. *New York*, *supra*, 337 U.S. at 250.[4]

"the factual basis for believing the * * * [hearsay evidence] was almost nil" (*id.* at 633). The Ninth Circuit has interpreted *Weston* to be limited to "a sentence explicitly based upon unverified, unreliable charges of very serious criminal conduct." *Farrow* v. *United States*, 580 F. 2d 1339, 1358 (9th Cir. 1978). See also *United States* v. *Wondrack*, 578 F. 2d 808, 809 (9th Cir. 1978) (under *Weston*, "sentence may be reviewed and vacated when it is premised on allegations of serious criminal conduct and 'the factual basis for believing the charge [is] almost nil' ").

[4] *Roviaro* v. *United States*, 353 U.S. 53 (1957), on which petitioner relies (Pet. 11-12), is inapplicable here. The balancing test of *Rovario* is confined to the trial stage of a criminal prosecution "where the issue [is] the fundamental one of innocence or guilt." *McCray* v. *Illinois*, 386 U.S. 300, 309 (1967). This Court has never applied *Roviaro* to a sentencing hearing, and petitioner cites no support for the proposition that it should apply.

In the instant case, the court of appeals correctly held that "Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the non-disclosure of his identity and there is sufficient corroboration by other means" (Pet. App. 4a, quoting 579 F. 2d at 713). Petitioner was apprised of the substance of the information offered against him and was afforded the opportunity, which he fully utilized, to refute the accuracy of that information. Finally, the court of appeals found that "there was more than ample evidence to corroborate * * * the information that the undisclosed informers supplied" (Pet. App. 8a-9a); indeed, as the district court concluded (458 F. Supp. at 412):

> The fact that seven different government agents, four of them from the FBI, relying on a total of seventeen independent informants, testified that [petitioner] was a member of the Gambino family, is, in the court's view, highly probative. Even if one or several of these experienced agents miscalculated the reliability of an informant, the large number of agents and informants, greatly reduces the margin for error. There are also the independent police observations of the defendant and his associates consorting with criminals. * * * While we must remain dubious of any conclusions based upon hearsay, the Government's proof here meets the rigorous burden of "clear, unequivocal and convincing evidence." The probability is at least 80% that [petitioner] is an active member of an organized crime family.

In these circumstances, review by this Court is unwarranted.

2. Petitioner also argues (Pet. 18-21) that the Jencks Act (18 U.S.C. 3500) applies at a sentencing hearing.[5]

The court of appeals correctly rejected this assertion (Pet. App. 11a). The Jencks Act refers only to the production of the statements of a witness "in a[ ] criminal prosecution" who has "testified * * * in the trial of the case" (18 U.S.C. 3500(a)). The courts of appeals have consistently held that the "trial of the case" in a criminal prosecution means the proceeding to determine a defendant's guilt or innocence. See *United States* v. *Bernard*, No. 78-3033 (9th Cir. Sept. 27, 1979); *United States* v. *Murphy*, 569 F. 2d 771 (3d Cir.), cert. denied, 435 U.S. 955 (1978); *United States* v. *Spagnuolo*, 515 F. 2d 818 (9th Cir. 1975); *United States* v. *Sebastian*, 497 F. 2d 1267 (2d Cir. 1974); *United States* v. *Percevault*, 490 F. 2d 126 (2d Cir. 1974); *United States* v. *McMillen*, 489 F. 2d 229 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973); *United States* v. *Montos*, 421 F. 2d 215 (5th

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[5]It is not clear that the material at issue here is subject to production under the Jencks Act in any event. Petitioner presumably seeks either documents provided to the testifying FBI agents by confidential informants or the agents' written notes of information orally furnished by the informants. The Jencks Act, however, requires production only of a witness' "statement," which is defined in pertinent part as "(1) a written statement made by said witness and signed or otherwise adopted or approved by him" or "(2) a * * * recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement" (18 U.S.C. 3500(e)). Since the informants did not appear as witnesses, the material they provided either in writing or as recorded and transcribed would not be subject to production. Likewise, the agents' notes of the informants' information would not be producible unless these notes were found to be the agents' (rather than the informants') statements. Thus, it is unlikely that the material in question would have been producible even if the Jencks Act were to apply at a sentencing hearing.

Cir.), cert. denied, 397 U.S. 1022 (1970); *United States* v. *Covello*, 410 F. 2d 536 (2d Cir.), cert. denied, 396 U.S. 879 (1969). Petitioner has cited no case, and we are aware of none, that indicates that the Jencks Act is applicable to the sentencing stage of a criminal prosecution.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1980

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[6]Petitioner's reliance (Pet. 20-21) on *United States* v. *White*, 342 F. 2d 379 (4th Cir.), cert. denied, 382 U.S. 871 (1965), and *United States* v. *Kelly*, 269 F. 2d 448 (10th Cir. 1959), cert. denied, 362 U.S. 904 (1960), is misplaced. Whatever the correctness of these decisions (compare, *e.g.*, *Beavers* v. *United States*, 351 F. 2d 507 (9th Cir. 1965)), they recognize at most that the Jencks Act might be applicable in a proceeding under 28 U.S.C. 2255. Unlike a sentencing hearing, a Section 2255 proceeding is an action separate from the criminal prosecution that can be similar in nature to a trial and involve questions concerning the defendant's guilt or innocence. Moreover, the defendants in *White* and *Kelly* were ultimately denied the relief requested under the Jencks Act. These decisions provide no support for the view that the Jencks Act is applicable to the sentencing stage of a criminal prosecution.

DOJ-1980-01